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Supreme Court of the United States

OCTOBER TERM, 1951

No. 697

GENERAL ARMATURE AND MANUFACTURING CO,.
Petitioner.

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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The Daily Record Co., Baltimore 3, Md.

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vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

The present proceedings arose out of a proceeding instituted by the National Labor Relations Board alleging that Petitioner had violated Section 8 (a) (5) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151, *et seq.*, by refusing to bargain with a labor organization which had been certified by the Board as the collective bargaining agent of Petitioner's employees. The facts underlying this petition are not in dispute.

After a hearing before a Trial Examiner, an intermediate report was issued recommending that the Petitioner be found to have committed the unfair labor practices which had been alleged and that an order of the Board be issued thereupon (R. 172a-210a). The Board issued its decision and order, adopting the findings and conclusions of the Trial Examiner (R. 211a-225a). Thereafter, it petitioned the Court of Appeals for the Third Circuit for enforcement of its order (R. 247-251), and the Court, after modifying the Board's order, entered a decree enforcing it as modified (R. 267-269).

One of the principal grounds advanced by the Petitioner in support of its position that it did not refuse to bargain collectively was that the Regional Director of the Board, who had conducted an election under a consent agreement to which the Petitioner was a party, had acted arbitrarily and capriciously and not in conformity with the policies of the Board or the requirements of the Act with regard to the investigation of objections to the election which had been duly filed by the Petitioner, and the resultant certification.

The Trial Examiner limited the Petitioner's testimony under this defense to (1) what information in support of its objections it had submitted to the Regional Director's agent, and (2) the nature, extent, and thoroughness of the investigation conducted by the Regional Director's agent (R. 67a, 78a-81a, 236, 238).

Murray Geller, a Field Examiner assigned to the office of the Regional Director, was the Board agent to whom the information had been submitted. He allegedly conducted an investigation and submitted a report based upon which the Petitioner's objections to the election were dismissed and the union certified (R. 183a-194a). This report was

admitted in evidence as part of the Board's case (R. 26a-30a; 56a). Affidavits obtained by Geller as part of the investigation were likewise introduced by the General Counsel and admitted (R. 43a-45a, 129a, 168a, 230-231).

Geller was present and sat beside the attorney representing the General Counsel throughout the hearing (R. 236, 241). In conformance with the ruling of the Trial Examiner as to the permissible scope of the Petitioner's defense, Geller's testimony was sought. Petitioner requested the General Counsel, through his representative at the hearing, to allow Geller to testify, but he contended that he did not have authority to grant the necessary permission (R. 236). Thereupon, Petitioner requested the Trial Examiner to issue a subpoena *ad testificandum* to Geller (R. 241). This was done and the subpoena served the same day (R. 257).[1]

The subpoena was signed by Board Member John M. Houston and directed Geller to appear to testify on the following morning (R. 257). The following morning, the General Counsel moved to quash the subpoena on the grounds that "Murray Geller has not obtained the written consent of the General Counsel of the National Labor Relations Board to testify in this proceeding" and that the testimony sought to be adduced was irrelevant (R. 229). The motion was denied by the Trial Examiner (R. 241, 242). When called to the stand, and after being sworn, Geller answered questions only as to his name, address, and position with the Board (R. 108a, 109a). He refused to

[1] In the view of the Court below, time intervals following this request were considered significant (R. 258). The record does not show the hour when the request for Geller's testimony was made, but it should be noted that the hearing commenced at 10:00 a. m. on Wednesday, July 6, 1949 (R. 51a), that the request for Geller's testimony appears on page 60 of the official transcript of the proceedings on the same day (R. 236, 257), and that the subpoena which was issued to Geller was returnable on the morning of the following day (R. 257).

answer any further questions, giving as his reason that he did not have the "written consent of the Regional Director or the General Counsel" as required, he contended, by Section 203.90 of the Board's Rules and Regulations, Series 5 (R. 109a).[2] When the Trial Examiner asserted that he did not have the power to command the testimony (R. 110a, 257), the Petitioner moved for a dismissal of the complaint upon the ground that it was denied an opportunity to introduce relevant evidence bearing upon the issues, thus depriving it of a full and fair hearing, as guaranteed by the Constitution and the applicable statutes. The motion was denied (R. 110a, 111a, 257, 258).

In its Decision and Order, the Board did not question the relevance of Geller's testimony which Petitioner sought to introduce in its defense, but summarily disposed of the issue by stating that Petitioner had "made no attempt to obtain permission for Geller to testify or even claim that it desired to obtain such permission, although there is nothing to show that, had such a request been made, it would not have been granted" (R. 213a). In so holding, the Board adopted the conclusion of the Trial Examiner that Petitioner had not been deprived due process in the presentation of its case and that the motion for dismissal of the complaint was properly denied (R. 184a, 213a).

On petition for enforcement, the Court below declared it unnecessary to decide whether or not it was the Petitioner's burden to obtain the authorization called for by Board Rule 203.90 (R. 258) allowing Geller to testify, but granted enforcement of the Board's order on the ground that consent from "Washington" was necessary, that the interval of less than a day for obtaining such consent was insufficient (ap-

[2] The rule is set forth in full in the Appendix. It appears as Rule 102.90 in the current Rules and Regulations, which became effective March 1, 1951.

parently as a matter of law), and that if Geller had had an opportunity of placing the matter before his superiors, he might have obtained permission to testify (R. 258). The Court held that the procedural steps required to obtain the necessary consent were "neither burdensome nor obscure" (R. 259).

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit (R. 255-259) is reported at 192 F. 2d 316. A decree enforcing the Board's order was entered on December 10, 1951 (R. 260-262). On December 19, 1951, Petitioner moved to modify the decree (R. 263-264), which motion resulted in its vacation on January 11, 1952 (R. 266), and on the same date, the Court entered a new decree of enforcement of the Board's order which in effect granted the motion of Petitioner to modify (R. 267-269). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The following questions are presented:

1. Does the National Labor Relations Board have authority to adopt a rule creating a privilege in an employee of the Board against testifying, and, if so, is Rule 203.90 a valid exercise of such authority?

2. Assuming that the Board has the authority to adopt a rule restricting the availability of testimony by one of its employees in a Board proceeding, did Rule 203.90, as interpreted and applied, deny Petitioner a full and fair hearing?

3. In a Board proceeding, do Board employees have a privilege against testifying to relevant matters which do not endanger the national security or are otherwise opposed to the public interest?

REASON FOR ALLOWING THE WRIT

Petitioner submits that the Supreme Court should exercise its discretion and grant the writ of certiorari for the reason that the decision of the Court of Appeals for the Third Circuit has in the present case decided an important question of Federal law which has not been, but should be, settled by this Court.

PRAYER

WHEREFORE, Petitioner respectfully prays that a writ of certiorari issue under the seal of this Court to the United States Court of Appeals for the Third Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its docket, No. 10,472, National Labor Relations Board, Petitioner v. General Armature and Manufacturing Co., Respondent, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of the United States Court of Appeals for the Third Circuit be reversed by this Court, and for such further relief as to this Court may seem just and proper.

Dated this 9th day of April, 1952.

GENERAL ARMATURE & MANUFACTURING CO.

By MARVIN C. WAHL,
Attorney for Petitioner.

BLANCHE GENAUER WAHL,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

Petitioner hereby adopts and makes a part of its brief the matters set forth in its petition for a writ of certiorari.

SPECIFICATION OF ERRORS

1. The Court erred in finding that Petitioner was not denied a fair and full hearing.

2. The Court erred in finding that the procedural steps required to obtain the necessary consent were neither burdensome nor obscure.

3. The Court erred in finding that it was unnecessary to decide whether the burden was upon Petitioner or Geller to obtain the authorization required by Rule 203.90.

4. The Court erred in finding that the interval between the time Geller's testimony was requested and the return of the subpoena *ad testificandum* afforded insufficient opportunity to obtain permission to testify.

5. The Court erred in finding that written consent from Washington was necessary in order to allow Geller to testify.

6. The Court erred in failing to hold that Rule 203.90 was invalid on its face, or in the alternative, that the Rule as applied by the Board, deprived Petitioner of a full and fair hearing as required by the Constitution and the applicable statutes.

7. The Court erred in failing to hold that Rule 203.90, creating a privilege against giving testimony, had no application in a proceeding instituted by the Board.

SUMMARY OF THE ARGUMENT

I. There is no authority in the statutes or the common law for the adoption of Board Rule 203.90.

II. Assuming *arguendo* that the Board has authority to regulate the disclosure of its documents and the giving of testimony by its employees in a Board proceeding, Rule 203.90 is an invalid exercise of such power.

III. Rule 203.90, as interpreted and applied in this case, deprived Petitioner of due process.

IV. Regardless of the validity of Rule 203.90, where the Board is a party to a proceeding, its employees do not have any greater privilege from disclosing relevant facts than its adversary.

ARGUMENT

I. There is no authority in the statutes or the common law for the adoption of Board Rule 203.90.

It has become a maxim of the law that the public has a right to every man's evidence. When summoned by competent authority, it is a public duty to give testimony. *Marbury v. Madison,* 1 Cranch 137; *U. S. v. Bryan,* 339 U. S. 323; *Zimmerman v. Poindexter,* 74 F. Supp. 933 (D. Hawaii); 58 Am. Jur., Witnesses, Secs. 9, 29; Wigmore, Evidence (3d ed.), Sec. 2192. In view of the broad public policy underlying the general rule, it has become equally firmly established that any attempt to create a privilege, being in derogation of the principle, will be strictly construed. *Duncan v. Cammell, Laird & Co.,* (1942) A. C. 624; *Robinson v. State of South Australia,* (1931) A. C. 704; *Peden v. Peden's Administrator,* 121 Va. 147; 58 Am. Jur., *Ibid,* Sec. 533; Wigmore, *Ibid.*

Thus, the authority to restrict disclosure or to adopt any rule which places impediments in the normal functions of the judicial process to obtain relevant evidence must have a clear foundation either in statute (*Touhy v. Ragen*, 340 U. S. 462; *Boske v. Comingore*, 177 U. S. 459) or the common law (*O'Neill v. U. S.*, 79 F. Supp. 827 (D. Pa.), rev'd. on other grounds *sub nom Alltmont et al. v. U. S.*, 177 F. 2d 971 (C. A. 3); *Cresmer v. U. S.*, 9 F. R. D. 203 (D. N. Y.); *State ex rel Haugland v. Smythe*, 169 P. 2d 706, Wash.) and it is not for the National Labor Relations Board or any other administrative agency to say, without such clear and specific authority, what is, and what is not, privileged. Wigmore, *supra*, Sec. 2378 (a).[3] Even where there is a clear statutory basis for adoption of such a rule, the exercise of authority under the statute, in order to be valid, must be accomplished by appropriate regulation. Cf. *Boske v. Comingore, supra.*

We come now to the question as to whether Rule 203.90, in light of these general principles, is authorized by law. It is clear that it is not. Under the National Labor Relations Act, as amended, the Board is given the power to make rules and regulations, in the manner prescribed by the Administrative Procedure Act, necessary to carry out the provisions of the statute. Section 6.[4] Nowhere is the Board given the right to make regulations concerning its records. Nowhere is there any reference to the adoption of rules authorizing the Board to make privileged the testimony of its agents which a defendant in an unfair labor practice proceeding might require as a defense. The Ad-

[3] See Note, 18 U. of Chi. L. Rev. 122.

[4] The pertinent provisions of the National Labor Relations Act, as amended, 29 U. S. C. Supp. III, Secs. 151 *et seq*, as well as the Administrative Procedure Act, 5 U. S. C., Secs. 1001 *et seq.*, are set forth in the Appendix.

ministrative Procedure Act sets forth certain minimal procedural requirements, but grants no substantive authority to an agency of the Government to issue regulations dealing with the question of immunity from process or privilege against disclosure. The National Labor Relations Act further provides that proceedings conducted by the Board are to be in accordance with the Federal Rules of Civil Procedure for the District Courts. Section 10 (b). These rules not only do not authorize the adoption of any such regulation, but treat the Government the same as any other private litigant in cases where it is a party. *Fleming v. Bernardi,* 4 F. R. D. 270 (D. Ohio); *U. S. v. General Motors Corporation et al,* 2 F. R. D. 528 (D. Ill.).

It is to be noted that the statute[5] authorizing executive departments of the Government to adopt rules against disclosure has no application to the Board, an administrative agency.[6] Cf. *Touhy v. Ragen, supra; Boske v. Comingore, supra;* O'Reilly, "Discovery Against the U. S.: A New Aspect of Sovereign Immunity?", 21 North Carolina L. Rev. 1, 14.

The common law doctrine as to governmental immunity from disclosure affords the Board no basis for the adoption of Rule 203.90, since the Rule goes beyond the disclosure of state secrets (*O'Neill v. U. S., supra; U. S. v. Haugen,* 58 F.

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[5] 5 U. S. C., Sec. 22, reads as follows:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

[6] Even where an executive department of the Government is involved and a regulation restricting disclosure issued thereunder, there may be circumstances in which relevant portions of Government files will be made available to a private litigant when necessary for its defense. *U. S. v. Schine Chain Theatres, Inc.,* 4 F. R. D. 108 (D. N. Y.)

Supp. 436 (D. Wash.)) or matters involving the public interest, such as the identity of informants (*U. S. v. Kohler Co.*, 9 F. R. D. 289 (D. Pa.); *U. S. v. Deere & Co.*, 9 F. R. D. 523 (D. Minn.)) or access to Government files (*Walling v. Comet Carriers, Inc.*, 3 F. R. D. 442 (D. N. Y.)). The breadth of the Board's rule is such as to create a privilege regardless of whether the information sought is by oral testimony or inspection of its files and records. The evidence which Petitioner sought to introduce through Geller — and which could be proven only through Geller — dealt with the nature and scope of the investigation he made, and what he did with the information given him which formed the basis of Petitioner's objections to the election. The identity of persons who might have given information to Geller was of no concern or interest to Petitioner.[7]

The Court below did not consider the question of the validity of Rule 203.90 upon the erroneous assumption that Petitioner was not raising the question.

II. Assuming arguendo that the Board has authority to regulate the disclosure of its documents and the giving of testimony by its employees in a Board proceeding, Rule 203.90 is an invalid exercise of such power.

The National Labor Relations Act authorizes the Board to make such rules and regulations as may be necessary to

[7] It should be noted that the information which Petitioner was seeking to obtain from Geller would not reveal the identity of his informants. It related only to the investigation conducted by Geller upon which the dismissal of Petitioner's objections to the election and the certification of the union were based. In the event any question asked of Geller might have disclosed the identity of employees of Petitioner and thus give rise to a fear of reprisal, the Trial Examiner had the power to exclude the question, while the Act itself provides safeguards against reprisal. Secs. 8 (a)(3), 8 (a)(4). Cf. *Walling v. Richmond Screw-Anchor Co.*, 4 F. R. D. 265 (D. N. Y.). *Fleming v. Bernardi, supra.*

carry out the provisions of the Act, but requires that the requirements of the Administrative Procedure Act be adhered to. Section 6. The Administrative Procedure Act guarantees only the minimum essential rights and procedures. House Report No. 1980, 79th Congress, 2d session, May 3, 1946. A major purpose of that Act was to assure that persons dealing with Federal agencies would have the means of ascertaining precisely what their rights and obligations were. *Ibid.* Thus, the Administrative Procedure Act provides for the publication of "* * * statements of the general course and method by which its functions are channeled and determined, including the *nature and requirements* of all formal or informal procedures available * * *" Section 3 (a) (2) (emphasis supplied). An agency is required to publish its substantive "rules", policies, and interpretations "for the guidance of the public". Section 3 (a) (3). "Rule" is defined as an agency statement describing the *"practice requirements"* of the agency. Section 2 (c). (emphasis supplied).

Rule 203.90 fails to meet these minimum requirements. It is vague and indefinite. It consists of an admonition to the Board's own employees; it does not define the scope of the privilege nor does it set forth a procedure for obtaining the consent of the Board or the General Counsel, which is demanded, in order to ascertain whether the information will be made available. What, if anything, a litigant who desires to have Board information released is supposed to do, is not disclosed. What duty, if any, is thrust upon a Board employee who is subpoenaed to testify is not revealed. The rule should have been declared "void". Wigmore, *supra*, Sec. 2379.

In this respect, Rule 203.90 differs radically from the rules adopted by other Federal administrative agencies and

even by the executive departments whose power to treat official information as confidential is clearly defined by statute. For example, while the rules of practice before the Federal Trade Commission authorize the production of materials designated as confidential only upon authorization by the Commission, they further declare that:

> "Service of such subpoena [*duces tecum*] shall immediately be reported to the Commission with a statement of all relevant facts. The Commission will thereupon enter such order or give such instructions as it shall deem advisable in the premises. If the officer or employee so served has not received instructions from the Commission prior to the return date of the subpoena, he shall appear in response thereto and respectfully decline to produce the documents or records subpoenaed (pointing out that he is not permitted to do so under this rule), and request a continuance pending action by or instructions from the Commission. If, notwithstanding, the Court or other body orders the production of any material subpoenaed, the officer or employee shall immediately report the facts to the Commission." 16 C. F. R. sec. 2.29 (i).

Likewise the rules of practice before the Securities and Exchange Commission set forth a procedure for obtaining information upon authorization of the Commission. When served with a subpoena requiring the disclosure of information or the production of documents deemed confidential, an employee of the Commission is required to "appear in Court and, unless the authorization described * * * shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this rule. *Any officer or employee who is served with such a subpoena shall promptly advise the Commission of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear upon the desirability of making*

available such information or documents." 17 C. F. R. sec. 201.13 (i) (emphasis supplied).

In cases arising under the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. 201, an investigator of the Wage and Hour Division who has been served with a subpoena is required to notify his superior to ascertain whether or not permission is to be given him to testify. Regulations of Department of Labor, Article 3, Part 5, Secs. 1, 2.

The executive departments of the Government have also adopted procedures which require that a subpoena served upon one of its employees is to be reported to a superior for action. Thus, under a rule of the Attorney General, when an employee of the Department of Justice is served with a subpoena *duces tecum* "he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General". Department of Justice Order No. 3229, Supplement No. 2, dated June 6, 1947. A regulation adopted by the Treasury Department provides a method of obtaining the consent of the superior in whom the discretion of authorizing the disclosure has been reserved. Treasury Regulation 12, Article 80, and Treasury Department Circular No. 591 (1938).

The "procedural steps" which the Court below found that Petitioner should have taken are steps which the Court itself read into the rule and which do not appear therein. While the Court admitted that these procedural steps were "somewhat larger" and "more time consuming" than obtaining such testimony would ordinarily be, it held that they were neither "burdensome" nor "obscure". Not only is exception taken to this finding of the Court, but it is submitted that if "procedural steps" were to be read into the Board's rule, there was ample authority and convincing logic to have followed the established procedures of the

executive departments and Federal agencies and require Geller, as a Board employee, to have inquired of the General Counsel whether to respond to the subpoena, rather than imposing the burden upon Petitioner. In Professor Wigmore's view:

> "Any *executive* or *administration regulation* purporting in general terms to authorize refusal to disclose official records in a particular department when duly requested as evidence in a Court of justice should be deemed void * * * The *procedure* in such cases should be: A letter of request * * * from the head of the Court to the head of the Department (accompanying the subpoena to the actual custodian), stating the circumstances of the litigation creating the need for the document; followed (in case of refusal) by a reply from the Departmental head stating the circumstances deemed to justify the refusal; and then a ruling by the Court, this ruling to be appealable and determinative of the privilege." Wigmore, Evidence, 3d ed., Sec. 2379.

The only type of rule against disclosure by a Federal administrative agency which should be found acceptable, according to Wigmore, is one such as that adopted by the S. E. C. *Ibid.*

III. Rule 203.90, as interpreted and applied in this case, deprived Petitioner of due process.

Assuming the validity of the rule and the authority of the Board to adopt it, it is earnestly contended that the interpretation thereof by the Board and the Court below, and its application to the facts in this case, resulted in depriving Petitioner of a full and fair hearing in violation of the Fifth Amendment of the Federal Constitution, and in contravention of the provisions of the National Labor Relations Act, as amended, and the Administrative Procedure Act.

Rule 203.90 is in derogation of the fundamental principle which makes all relevant evidence in every person's possession available to the litigant who properly demands it, and accordingly should have been strictly construed. 58 Am. Jur., Witnesses, Sec. 533; cf. *Walling v. Richmond Screw-Anchor Co., supra.* Nevertheless, as interpreted and applied in the instant case, its effect was to make all testimony of all employees of the Board and all documents, files, and records of the Board automatically privileged, subject only to a written consent of the Board or the General Counsel authorizing the testimony. Such a construction permits the Board to arrogate to itself a power for which there is no basis in law or justification in our jurisprudence. Under such an interpretation, the determination of the privilege by the Board is, in effect, conclusive. This gives rise to dangerous implications. An administrative agency which prosecutes and adjudicates, retaining the power to deprive a defendant of the means of establishing a lawful defense, has the tools of tyranny in its grasp. In the American system of law, it is the Courts and not any other instrumentality of Government which determines the existence of the privilege. *Evans v. U. S.*, 10 F. R. D. 255 (D. La.); *U. S. v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (D. La.), affd. 339 U. S. 940; *Zimmerman v. Poindexter*, 74 F. Supp. 933 (D. Hawaii). As stated by Professor Moore: "Although the Government's claim of privilege is entitled to respectful consideration * * * the determination of that privilege is for the Court, not the Government, in an action in which the Government is a litigant." 4 Moore's Federal Practice, (2d ed.) p. 1176. And, as stated in the *Evans* case, *supra*, at pp. 257, 258: "It is not the exclusive right of any such agency of the Government to decide for itself the privileged nature of any such documents, but the Court is the one to judge of this when such contention is made

* * * This would seem to be the inevitable consequence of the Government's submitting itself either as plaintiff or defendant to litigation with private persons."

In its decision the Court below ruled that it was unnecessary to decide whether the burden was upon Petitioner or Geller to obtain the authorization required by Rule 203.90. But in holding that Petitioner failed to ask Geller to inquire of the Board whether it would permit him to testify, the Court, in effect, places the onus squarely upon Petitioner. As a Field Examiner, Geller was under the supervision of the General Counsel. National Labor Relations Act, as amended, Sec. 3 (d). By the terms of the rule in question, the General Counsel's written consent was necessary. When permission was asked of the General Counsel's representative at the hearing, at whose side Geller sat, he contended that he lacked authority to permit Geller to testify. Was it not reasonable for the General Counsel's representative, after the subpoena was served on Geller, if not at the time of the earlier request, to have inquired of the General Counsel, in whom discretion had been reserved, as to whether Geller would be permitted to testify in light of the Trial Examiner's ruling? If permission were granted, its written form might have been furnished in a telegram from the General Counsel or in a statement by the General Counsel's representative at the hearing, given on the authorization of the General Counsel.

If insufficient time was allowed to obtain the necessary clearance, as suggested by the Court below, would it have been unreasonable for Geller or the General Counsel to have pleaded a lack of opportunity to have obtained the consent, rather than to hold, as a matter of law, that the interval of less than a day was insufficient? Was it the duty of Petitioner, as the Court below states, to ask that

the hearings be adjourned in order to obtain the required consent?

In any event, when Petitioner requested the representative of the General Counsel in open court to permit Geller to testify, it went beyond the requirements of the rule and actually assumed the burden which the Court inferentially held that it had. *U. S. v. Grayson*, 166 F. 2d 863 (C. A. 2). As Judge Learned Hand said in that case: "Although it does not appear that Grayson asked the Commission to 'order otherwise' [to release certain documents from their confidential status], we hold that he was justified in supposing that the prosecution [which had denied the request] spoke for the Commission and that any request would have been denied" (at p. 870).

It is submitted that the exceedingly liberal interpretation and application of the rule by the Court below threw the burden squarely upon Petitioner, ignoring the basic principle that one seeking an exception under a claim of privilege to the requirement of responding to a subpoena has the burden of showing that he is entitled to it. 58 Am. Jur., Witnesses, Sec. 370. Petitioner assumed its burden of attempting to obtain the testimony — that burden properly belonged to it — but the rule was interpreted to place on Petitioner the burden of obtaining the consent of the Board, a far different proposition. The converse of such a proposition is that a Board employee who is served with a Board subpoena has no burden to assume, no duty to discharge. Surely, if the burden is to be thrust upon the party seeking the testimony to obtain the consent of the employee's superior, that duty should be clearly spelled out in the rule, as the Administrative Procedure Act requires.

IV. Regardless of the validity of Rule 203.90, where the Board is a party to a proceeding, its employees do not have any greater privilege from disclosing relevant facts than its adversary.

Aside from the questions of whether the Board has the authority to adopt a rule creating a privilege in itself and its employees, and if so, whether Rule 203.90 is a proper exercise of such power, it is clear that where the rule is made applicable in a proceeding to which the Board itself is a party, the defendant is placed at a distinct disadvantage which is not sanctioned by the Constitution or applicable statutes. Where the Board, acting as an enforcement agency, grants immunity to one of its employees from testifying, it has the effect, as it did in this case, of depriving the defendant of a "fair and open hearing" (*Morgan v. U. S.*, 304 U. S. 1, 14, 15), of the equal protection of the laws (*Re French*, 315 Mo. 75), and it negated the "personal responsibility of Governmental agencies" which underlies our conception of law (*Bank Line v. U. S.*, 163 F. 2d 133, 138 (C. A. 2)). In essence, the decision of the Board and the enforcement of its order by the Court below recognizes the validity of Petitioner's defense, but denies it an opportunity to prove it.

It would seem fundamental that the papers and documents of the Board are not *per se* confidential. *N. L. R. B. v. Cherry Cotton Mills*, 98 F. 2d 444 (C. A. 5). *A fortiori*, the testimony of a Board agent concerning his acts in the performance of his official duties are not *per se* privileged from disclosure. Nevertheless, the rule in issue subjects all papers and records of the Board to a privilege from disclosure and restricts testimony "in behalf of any party to any cause pending in any court or before the Board", regardless of the nature of the proof sought to be adduced.

If it became imperative in a proceeding before the Board that relevant testimony, which could not be introduced through secondary sources, be withheld because its disclosure might endanger the security of the nation (*Totten v. U. S.*, 92 U. S. 105; *U. S. v. Haugen, supra*) or because of supervening public policy, such as the protection of the identity of informants (*U. S. v. Ebeling*, 146 F. 2d 254 (C. A. 2); *U. S. v. Cohen*, 148 F. 2d 94 (C. A. 2), cert. den. 325 U. S. 852; *Harris v. Walsh*, 277 F. 569, (C. A. D. C.)), then the defendant must be relieved of liability and the complaint dismissed. *U. S. v. Andolschek*, 142 F. 2d 503 (C. A. 2); *U. S. v. Krulewitch*, 145 F. 2d 76 (C. A. 2); *U. S. v. Grayson*, 166 F. 2d 863 (C. A. 2); *Parsons v. State*, 251 Ala. 467; *U. S. v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (D. La.), affd. 339 U. S. 940. Only Geller could have furnished the desired testimony.

Geller was served with a subpoena *ad testificandum*, not a subpoena *duces tecum*. Petitioner had previously asked the General Counsel's permission to allow Geller to *testify;* it did not request the production of Board records. Even if public policy were stretched to protect all records and documents of the Board from disclosure, although relevant and necessary to a lawful defense, that public policy would have no application where only oral testimony is sought. *Fleming v. Bernardi, supra; Walling v. Comet Carriers*, 3 F. R. D. 442 (D. N. Y.). Moore, in his treatise on Federal Practice (2d. ed.), has stated the issue as follows: "The various types of documents and information which may be involved also affect the determination of the questions presented: a secret report dealing with military matters obviously involves different considerations from a report of an investigator as to whether a party to a Wage-Hour action has violated the Fair Labor Standards Act." Vol. 4, p. 1161.

Assuming *arguendo* that under appropriate circumstances there existed a privilege in the Board and its employees against disclosure, the authorities are clear that by instituting the proceeding, the privilege was waived. This rule is applied in criminal proceedings (*Bowman Dairy Co. v. U. S.*, 341 U. S. 214; *U. S. v. Beekman*, 155 F. 2d 580 (C. A. 2); *U. S. v. Andolschek, supra; U. S. v. Krulewitch, supra; U. S. v. Grayson, supra*), in civil actions, whether the Government is plaintiff or defendant (*Bank Line v. U. S.*, 163 F. 2d 133 (C. A. 2); *U. S. ex rel Schlueter v. Watkins*, 158 F. 2d 853 (C. A. 2); *Brewer v. Hassett*, 2 F. R. D. 222, (D. Mass.); *Kentucky-Tennessee Light and Power v. Nashville Coal Co.*, 55 F. Supp. 65 (D. Ky.); *O'Neill v. U. S., supra; U. S. v. General Motors, supra*), and where Federal administrative agencies have instituted enforcement action. *Bowles v. Ackerman*, 4 F. R. D. 260 (D. N. Y.); *Fleming v. Bernardi, supra; Walling v. Richmond Screw-Anchor Co.*, 4 F. R. D. 265 (D. N. Y.).[8]

It has always been the policy of American courts to treat the Government, when appearing as a litigant, as any private individual. *Bank Line v. U. S., supra.* In considering the question of privilege claimed under an agency rule of non-disclosure, the Court in *Fleming v. Bernardi, supra*, an action by the Wage and Hour Administrator, stated as follows (at p. 271, 272):

> "That Government files and records may be protected as confidential by departmental regulations is well established. [Citing *Boske v. Comingore, supra*, and *Ex parte Sackett, supra.*] If this were a suit be-

[8] In cases between priviate litigants or a state and a private litigant, there is more reason to uphold the privilege. *Ex parte Sackett*, 74 F. 2d 922 (C. A. 9); *Boske v. Comingore, supra; Fowkes v. Dravo Corp.*, 5 F. R. D. 51 (D. Pa.); *Stegall v. Thurman* 175 F. 813 (D. Ga.); *In re Lamberton*, 124 F. 446 (D. Ark.). But see *Zimmerman v. Poindexter, supra*, where in a civil action for false imprisonment, the Government's claim of privilege was rejected.

tween private parties, and a subpoena were issued to the Administrator to produce his files, he might very well decline under the law which protects privileged documents * * * But this suit is not between private parties. Here the Administrator is himself the plaintiff and seeks a decree of this court. It seems that when a party seeks relief in a Court of law, he must be held to have waived any privilege, which he otherwise might have had, to withhold testimony required by the rules of pleading or evidence as a basis for such relief * * *.

"The Administrator may well keep secret all communications until he takes action in Court based upon such information; but then he must disclose such information if it is required by the rules of criminal or civil procedure as a foundation for such action."

In *Bowles v. Ackerman, supra,* involving a suit by the Price Administrator to enjoin defendant from selling in excess of the maximum ceiling price, the Court held it unfair "that one party may obtain evidence from another, upon which it seeks an injunction of wide application * * * and may refuse to reveal that evidence, where required by orderly procedure in the suit brought, on a claim that it is confidential" (p. 262).

The reasoning of the Court in the *Andolschek* case, *supra,* which involved a criminal proceeding is pertinent. "While we must accept it as lawful for a department of the Government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject

matter. *The Government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.* Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant" (142 F. 2d at 506) (emphasis supplied). The reasoning in *Andolschek* is equally applicable in a civil suit. *Bowles v. Ackerman, supra.*

Moreover, assuming the initial validity of the privilege, it was waived not only by the institution of proceedings against Petitioner, but by the Board basing its complaint upon the Regional Director's report which had dismissed Petitioner's objections to the election, and by placing said report in evidence together with affidavits obtained by Geller in the course of his investigation. *U. S. v. Krulewitch, supra; Federal Savings and Loan Ins. Corporation v. First Nat. Bank, etc.*, 3 F. R. D. 487 (D. Mo.). As the Court stated in the *Krulewitch* case, *supra*, "When their possessor [of privileged communications] chooses to bring into the light the transaction to which the communications relate, he may no longer suppress the communications themselves. The justification for the privilege lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public" (at p. 79).

That the Board in instituting proceedings against Petitioner surrendered any privilege of non-disclosure which it might otherwise have enjoyed is also demonstrated by the fact that its proceedings were required to be conducted in accordance with the rules of evidence applicable in the District Courts of the United States. Section 10 (b) of the Act. It is well settled that where the Federal Rules of Civil Procedure are applicable, the Government stands in

the same position as any ordinary litigant. *Walling v. Richmond Screw-Anchor Co., supra; Fleming v. Bernardi, supra; Bowles v. Ackerman, supra.* The Federal Rules of Civil Procedure do not grant a privilege, be it the Government or private party, and we have already seen that a privilege was not given the Board by statute or by the common law. Thus, the Board would not be entitled to any privilege which Petitioner itself did not have, and it is not contended that Petitioner could have prevented the disclosure of, for example, the Regional Director's report upon which the Board rested its case on a ground of privilege.

Consideration to this phase of the argument was not given by the Court below. The rule of the *Andolschek* case was acknowledged to the extent of stating that the Court was not concerned with the possible consequences of a refusal by the Board to permit Geller to testify (R. 258). However, the Court did not recognize the more basic question as to whether there may be *any* rule invoked in a Board proceeding which places *any* limitation upon the right of a party charged with an unfair labor practice to obtain testimony from a Board employee where it is necessary for its defense.

It is submitted that even if there were authority for the adoption of Rule 203.90, and even if Rule 203.90 met the requirements of the Administrative Procedure Act, it should have been found to have no application for the reasons hereinabove set forth.

Respectfully submitted,

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April, 1952.

APPENDIX

National Labor Relations Board, Rules and Regulations, Series 5, as amended August 18, 1948.

Rule 203.90—

Same; Board employees prohibited from producing files, records, etc., pursuant to subpena duces tecum, prohibited from testifying in regard thereto. — No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpena, subpena duces tecum or otherwise, without the written consent of the Board or the Chairman of the Board, if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any subpena or subpena duces tecum calling for records or testimony as described hereinabove shall have been served upon any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the Chairman of the Board, or the general counsel, as the case may be, appear in answer thereto and respectfully decline by reason of this rule to produce or present such files, documents, reports, memoranda or records of the Board or give such testimony.

* * * * * *

National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151, *et seq.*

Sec. 3 * * *

(d) * * * The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

* * * * * *

Sec. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * * *

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * * *

Sec. 10. * * *

(b) * * * The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C.)

* * * * * *

Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. * * *

* * * * * *

Administrative Procedure Act, 5 U. S. C., Secs. 1001, *et seq.*

Sec. 2 (c) Rule and rule making—

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policies or to describe the organization, procedure, or practice requirements of any agency. * * *

* * * * * *

Sec. 3. Except to the extent that there is involved—

(1) Any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Rules — Every agency shall separately state and currently publish in the Federal Register

(1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policies or interpretations formulated and adopted by the agency for the guidance of the public. * * *

* * * * * *

Sec. 9. In the exercise of any power or authority—

(a) In general — No sanction shall be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law.

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